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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

PATRICIA M. LETNES, individually, and on behalf of Terrence A. Letnes
Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Respondent,

and

WAIG AIRCRAFT, INC., KENNY WHITE, GABY GARRETT, ROGER IVERSON,
Real Parties in Interest.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should the District Court for the District of Arizona have the power to retain jurisdiction over petitioner's state law claim against real parties in interest?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were Patricia M. Letnes, individually and on behalf of Terrence A. Letnes, plaintiff and real party in interest, the United States District Court for the District of Arizona, respondent and Waig Aircraft, Inc., Kenny White, Gary Garrett and Roger Iverson, defendants and petitioners.

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OPINIONS BELOW

The Order of the District Court for the District of Arizona denying the motion of the real parties in interest to dismiss for lack of subject matter jurisdiction is attached hereto in the Appendix. The Order of the Court of Appeals for the Ninth Circuit granting the Petition for Writ of Mandamus of the real parties in interest is attached hereto in the Appendix.

JURISDICTION

The Order of the Court of Appeals for the Ninth Circuit was made and entered on July 5, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

Title 28 U.S.C. § 1346(b):

> "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred".

STATEMENT

This is a wrongful death action brought by the widow and surviving daughter of Ronald K. Letnes (hereinafter referred to as decedent). The named defendants are, United States of America, represented by the U.S. Department of the Interior and the U.S. Department of Agriculture, (hereinafter referred to as 'U.S.'), Waig Aircraft, Inc., and the principals of Waig Aircraft, Inc., (hereinafter referred to as 'defendants').

Decedent was employed by defendants as a pilot. Decedent was killed while co-piloting an aircraft designed as an air tanker for the purpose of aerial fire fighting. The aircraft was involved in a mid air collision with another air tanker. Both aircraft were owned and operated by defendants.

At the time of the collision defendants were under contract with the U.S. to provide the U.S. with seasonal control over certain aircraft and pilots capable of fighting forest fires on U.S. lands. At that time defendants failed to provide workman's compensation insurance as is required by applicable Arizona and federal law.

Plaintiff (hereinafter referred to as 'petitioner'), filed a complaint containing three causes of action all arising from the crash of defendants' aircraft on December 2, 1980.

1. Petitioner's first cause of action alleges that defendants were negligent in the maintenance, operation, supervision and control of both the aircraft and personnel involved in the collision which killed decedent. Under applicable Arizona law, a plaintiff may bring an action for damages against an employer when the employer fails to provide workman's compensation insurance.

2. Petitioner's second cause of action alleges that, under applicable federal and Arizona law, the U.S. was the statutory employer of decedent. As the statutory employer, the U.S. would be both directly liable to petitioner and vicariously liable for the acts or omissions of defendants. Petitioner further states that the U.S. was negligent in the maintenance, operation, supervision and control of the two aircraft and personnel involved in the collision which killed decedent.

3. Petitioner's third cause of action alleges that the U.S. was negligent when it failed to determine whether defendants had complied with the workman's compensation laws prior to awarding the government contract. Petitioner further alleges that decedent was the third party beneficiary of the said contract and that he justifiably relied on the representations contained therein to the effect that defendants had secured workman's compensation insurance.

Defendants moved in the District Court to dismiss the action against them for lack of federal subject matter jurisdiction. The District Court for the District of Arizona exercised its discretion in favor of retaining jurisdiction over petitioner's state law claim against defendants. The court recognized that the retention of jurisdiction over petitioner's state law claim will result in considerable savings of judicial time and energy, preclude the possibility of inconsistent judgments in federal and state courts and ensure that the interests of the parties involved are not otherwise impaired or impeded. Accordingly, the District Court denied defendants Petitioners motion to dismiss on December 17, 1982.

On March 4, 1982 defendants filed a Petition for Writ of Mandamus with the United States Court of Appeals for the Ninth Circuit. Defendants' petition was accepted for consideration by the court on May 3, 1983 and the matter was briefed by counsel. On July 5, 1983 the Court of Appeals for the Ninth Circuit granted defendants' petition and directed the District Court for the District of Arizona to dismiss petitioner's claim against defendants. Petitioner then filed a motion for Stay of Mandate on July 8, 1983 and subsequently filed this Petition for Writ of Certiorari.

EXISTENCE OF JURISDICTION BELOW

The District Court for the District of Arizona had jurisdiction over the tort claims against the United States under Title 28 U.S.C. § 1346(b).

ARGUMENT

The order below should be reviewed because it is in direct conflict with decisions in six of the other Circuit Courts of Appeals on this issue and because the order is not consistent with this Court's most recent pronouncement on this issue in *Aldinger v. Howard*, 427 U.S. 1 (1976).

1. While the order of the Ninth Circuit below finds support in prior decisions within that circuit it is contrary to the position taken in the majority of the courts of appeals since the decision of this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), which expanded the concept of pendent jurisdiction. In a line of cases beginning with *Hymer v. Chai*, 407 F.2d 136 (1969) the Ninth Circuit has consistently refused to recognize the jurisdictional power of the district courts within the circuit to hear claims as pendent to substantial federal claims when this would bring a new party into the lawsuit as to whom there exists no independent basis for federal jurisdiction. This rigid approach in the Ninth Circuit, however, has long been criticized. This Court, in addressing the issue, recognized that the decision in *Hymer* is:

> ". . . at odds with the clear trend of lower federal court authority since this Court's decision in *Gibbs*. It is true that numerous decisions throughout the courts of appeals since *Gibbs* have recognized the existence of judicial power to hear pendent claims involving pendent parties where the entire action before the court com-

> prises but one constitutional 'case' as defined in *Gibbs*. *Hymer* stands virtually alone against this post *Gibbs* trend in the courts of appeals, . . ."
>
> *Moor v. County of Alameda*, 411 U.S. 693, 713-714 (1973).

The decision below, in following *Hymer*, is in conflict with the following decisions rendered on the same issue in other circuits: *Almenares v. Wyman*, 453 F.2d 1075 (2nd Cir. 1971); *Jacobsen v. Atlantic City Hospital*, 392 F.2d 149 (3rd Cir. 1968); *Stone v. Stone*, 405 F.2d 94 (4th Cir. 1968); *Boudreaux v. Puckett*, 611 F.2d 1028 (5th Cir. 1980); *F.C. Stiles Contracting Company v. Home Insurance Company*, 431 F.2d 917 (6th Cir. 1970); and *Schulman v. Huck Finn Inc.*, 472 F.2d 864 (8th Cir. 1973). The lack of conformity between the decisions of the Ninth Circuit on this issue and those of other courts of appeals is apparent, and the need for uniformity in the federal courts argues strongly for review of the order below.

2. In addition to being in conflict with decisions in other circuits, the decision below is inconsistent with the holding of this Court in *Aldinger v. Howard*, 427 U.S. 1 (1976), particularly in light of the fact that the District Court for the District of Arizona chose to exercise its discretion in this case in favor of hearing all of petitioner's claims in federal court.

Aldinger recognized that the exercise of pendent jurisdiction involves both the jurisdictional power of the district court and the discretion of the court. It was held that in order for such jurisdictional power to exist when a new party will be brought into the suit, "a federal court must satisfy itself not only that Article III permits it, but that

Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence". *Aldinger v. Howard*, 427 U.S. at 18. Thus when these requirements are met the district court has the power to hear the pendent claims, and the exercise of that power is a matter within the discretion of the district court. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

It is manifest that jurisdictional power exists in this case under the test set out in *Aldinger*. The fact that such jurisdiction is permitted by Article III is established by noting that petitioner's claims fall within the *Gibbs* definition of a single constitutional "case" since they arise from a common nucleus of operative fact and, when considered without regard to their federal or state character, would be expected to be tried all in one judicial proceeding. *United Mine Workers v. Gibbs*, 383 U.S. at 725. The second of the *Aldinger* tests is likewise satisfied by noting that Congress, in passing 28 U.S.C. Section 1346(b) did not in any way address the issue of jurisdiction over parties other than the U.S., much less expressly or impliedly negate its existence. More than mere congressional silence must be required in order to preclude the existence of pendent jurisdiction in a case such as this.

That this case is an appropriate one for the exercise of pendent-party jurisdiction is further demonstrated by the fact that this Court, in *Aldinger*, cited a situation involving claims pendent to federal claims brought under Section 1346(b) as an example of a case wherein the exercise of pendent-party jurisdiction might be appropriate, since "only in a federal court may all of the claims be tried together". *Aldinger v. Howard*, 427 U.S. at 18.

Since jurisdictional power exists in the district court to hear petitioner's state law claims against defendants, the only remaining question should be whether the court chose to exercise its discretion in favor of hearing all of petitioner's claims. In this case the District Court for the District of Arizona chose to exercise its discretion in favor of hearing all of petitioner's claims in federal court. Nevertheless, the Court of Appeals for the Ninth Circuit, disregarding the undeniable existence of jurisdictional power in the district court and the valid exercise of its discretion, granted defendants' Petition for Writ of Mandamus and directed the District Court to dismiss petitioner's claims against defendants for lack of subject matter jurisdiction. Such action on the part of the Court of Appeals for the Ninth Circuit is inconsistent with the decision of this Court in *Aldinger v. Howard* and the order below should therefore be reversed.

CONCLUSION

The issues presented by this case are of significant and recurring importance in the administration of the Federal Tort Claims Act. This importance is heightened by the significant impact that appropriate resolution of this matter will have in furthering the policy goals of judicial economy and convenience at a time when our courts are increasingly congested and judicial time and energy is becoming a scarce and valuable resource.

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

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Attorney for Petitioner

(Appendix follows)

Appendix

In the United States District Court
For the District of Arizona

No. CIV 82-418 TUC ACM

Patricia M. Letnes, individually,
and on behalf of Terrence A. Letnes,
Plaintiff,

vs.

The United States of America,
Waig Aircraft, Inc., Kenny White,
Gary Garrett, Roger Iverson,
Defendants.

Filed Sept. 17, 1982

ORDER

This matter is before the court on the defendants, Waig Aircraft, Inc., Kenny White, Gary Garrett, and Roger Iverson's motion to dismiss the complaint for this court's lack of subject matter jurisdiction. A hearing was originally requested by the defendants but the court was subsequently informed that neither party desired a hearing before the court. Therefore, this matter is being submitted on the pleadings.

Plaintiffs are the widow and surviving daughter of Ronald K. Letnes (decedent). Plaintiffs brought this action pursuant to 28 U.S.C. § 1346(b), commonly known as the Federal Tort Claims Act. Named as defendants are the

United States of America and the defendants who filed the pending motion to dismiss.

The decedent died while co-piloting an aircraft designed as an air tanker for the purpose of aerial fire fighting. Decedent's aircraft was involved in a mid-air collision with another air tanker. Decedent's aircraft crashed killing him instantly.

At the time of the accident, decedent was employed by the defendant Waig Aircraft, Inc. (Waig). Waig failed to provide Workmen's Compensation Insurance as is required by applicable Arizona law. At the time of this accident, Waig was under contract with the defendant United States of America. The contract provided the U.S. with seasonal control over certain aircraft and pilots capable of fighting forest fires on United States lands.

Plaintiffs allege that the United States Forest Service and the Office of Air Services were negligent in their supervision, control, operation, and maintenance of the aircraft involved in the accident. Plaintiffs also allege that the United States was negligent when they failed to determine if Waig had complied with the applicable Workmen's Compensation laws prior to awarding the government contract.

Plaintiffs allege, as a pendent state claim, that the defendant Waig and its corporate officers White, Garrett, and Iverson were also negligent in their maintenance and operation of the decedent's aircraft.

All defendants, except for the United States, have filed a motion to dismiss for this court's lack of subject matter jurisdiction over them. Their position is that the plaintiffs

have annexed a state claim against the moving defendants in their Federal Tort Claims Act in the United States District Court without an independent basis of federal jurisdiction over the state negligence cause of action. *State of Idaho, ex rel. Trombley v. United States Department of the Army, Corps of Engineers,* 666 F.2d 444 (9th Cir. 1982). In *State of Idaho, supra,* the court noted that the Ninth Circuit has consistently rejected the concept of pendent jurisdiction to join additional parties to a Federal Tort Claims Act action without an independent basis of jurisdiction. *Hymer v. Chai,* 407 F.2d 136 (9th Cir. 1969); *Ayala v. United States,* 550 F.2d 1196 (9th Cir. 1977).

However, pendent jurisdiction is a specialized application of the ancillary jurisdiction concept. Its application traditionally has been in situations in which a plaintiff seeks to append a nonfederal claim to a substantial claim against the *same* defendant. 7 C. Wright & A. Miller, Federal Practice and Procedure § 1659 at 314 (1972) (emphasis added). Ancillary jurisdiction is the broader concept allowing a court to acquire control of an entire controversy —both the claims and additional parties where it has no independent jurisdiction of one or more parties. See Id. at 312-13. If jurisdiction exists to join Waig and its officers then it exists under the rules of ancillary jurisdiction. *Jacobs v. United States,* 367 F.Supp. 1275 (1973).

The court has jurisdiction of the claim against the United States by virtue of 28 U.S.C. 1346(b); it has no independent jurisdiction—diversity or federal question—of Waig and its corporate officers. Here, Waig and its officers are attempted to be joined as a joint or otherwise

related tort feasor. No special federal rule of tort theory controls that question, but rather the rules controlling all federal litigation apply. *United States v. Yellow Cab Co.*, 340 U.S. 543 at 550-554 (1951).

There are a number of ways in which a new party could be introduced into litigation over which the court already has jurisdiction. F.R.Civ.P. 14, 19, 20, 24. Here, as in *Jacobs, supra,* Waig and its officers meets the criteria for compulsory joiner. F.R.Civ.P. 19(a). As in *Jacobs,* the United States and Waig are charged with negligence in the operation, maintenance, control, and supervision of aircraft involved in a collision. Those claims not only involve common questions of law and fact, but leave Waig so situated that the disposition of the action in its absence may as a practical matter impair or impede its ability to protect its interest.

There is no doubt that considerable savings of judicial energy and time will result by retaining jurisdiction of the plaintiffs' state law claim. The United States cannot be sued in state court. If jurisdiction over Waig and its corporate officers is refused, the case must be tried twice in separate forums. The state and federal claims derive from a common nucleus of operative facts. The plaintiff's claims are such that they would normally be expected to be tried all in one judicial proceeding. The power of this court to join the state and federal claims where othewise that jurisdiction would not exist as to the state claims is discretionary, but *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966) teaches that when the above factors are present the court should exercise its discretion in favor of hearing the entire dispute in one forum.

Accordingly, defendants Waig, White, Garret and Iverson's Motion to Dismiss for this court's lack of subject matter jurisdiction is denied.

Dated this 17th day of September, 1982.

/s/ ALFREDO C. MARQUEZ

Alfredo C. Marquez
United States District Judge

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United States Court of Appeals
For the Ninth Circuit

No. 83-7157

DC# DIV 82-418 TUC AMC
Arizona (Tucson)

Waig Aircraft, Inc., Kenney White,
Gary Garrett, Roger Iverson,
Petitioners,

vs.

United States District Court
for the District of Arizona,
Respondent.

and

Patricia M. Letnes, individually and on
behalf of Terrence A. Letnes,
Real Party in Interest.

Filed July 5, 1983

ORDER

Before: TANG and NORRIS, Circuit Judges.

This petition for writ of mandamus is granted. Subject matter jurisdiction is lacking as to the claim against petitioners in district court. *See State of Idaho ex rel. Trombley v. U.S. Department of Army*, 666 F.2d 444, 446 (9th Cir. 1982). The district court shall dismiss the claim against petitioners.